No. 45531-5-II
(Consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

RYAN O'BRIEN,

Respondent.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Judge Ronald E. Culpepper (suppression ruling)

BRIEF OF RESPONDENT O'BRIEN

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant O'Brien

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

Pursuant to RAP 10.1(g), Ryan O'Brien adopts and incorporates herein by reference the assignments of error, issues presented and arguments made in the response brief filed on behalf of his codefendant, Michael Elmore. In addition, he submits this additional briefing.

B. ADDITIONAL ISSUES PRESENTED

1. Where the prosecution fails to present all of the portions of the record relevant to a trial court's ruling it asks the Court to overturn, should the Court decline to address the state's appeal?

2. Where the prosecution does not challenge a trial court's oral ruling but asks the Court to hold contrary to that ruling, should the Court reject that request on the state's appeal?

3. Should this Court decline the prosecution's offer to interpret an authorization under our state's very restrictive Privacy Act broadly in favor of law enforcement when the history and purposes of the Act and prior decisions of our highest Court do not support it and the prosecution has made no effort to argue that such an interpretation is consistent with the Act?

C. STATEMENT OF THE CASE

1. Procedural Facts

Respondent Ryan O'Brien was charged by amended information with two counts of first-degree trafficking in stolen property, two counts of unlawful possession of a stolen vehicle, and three counts of first-degree taking a motor vehicle without permission. CP 6-9; RCW 9A.56.020(1), RCW 9A.56.068, RCW 9A.56.070(1), RCW 9A.56.140, RCW

9A.82.050(1). His case was joined with that of Michael D. Elmore for trial. CP 19-20.

On October 30 and 31 and November 4, 2013, the Honorable Judge Ronald Culpepper held pretrial proceedings, including a motion to suppress evidence as gathered in violation of the Privacy Act.[1] After the motion to suppress was granted, the prosecutor stated he could not go forward with the case without the evidence. 3RP 20-21. The court then dismissed the charges without prejudice. 3RP 21-22. The prosecution appealed and filed its opening brief. See CP 32-35. This pleading follows.

2. Statement of relevant facts in response

After the defense filed its motion to suppress based on Privacy Act violations, the prosecutor then presented the testimony of Detective Shaun Darby of the Pierce County Sheriff's Department (PCSD). 2RP 10. In about January of 2013, Darby had worked with the "Auto Crimes Enforcement Task Force" as a detective. 2RP 11. The force had created a fake storefront as part of "Operation Shiny Penny," an undercover operation designed to "combat auto theft" by setting up a "shop" and letting people know they were in the "business of buying any and all types of property." 2RP 12. Soon, Darby said, officers were buying stolen cars at a "rapid pace" at the shop from many different people. 2RP 12-13.

---

[1]There are three volumes containing the verbatim report of proceedings in this case, which will be referred to as follows:
the volume containing the proceeding of October 30, 2013, as "1RP;"
October 31, 2013, as "2RP;"
November 4, 2013, as "3RP."

After the fake "shop" was set up, from October or November of 2012 until January 23 of 2013, the officers bought about 24 stolen vehicles, buying one about twice a week. 2RP 13-14. Darby opined that the people selling the cars were all "loosely associated," by which he meant that someone would tell their friends and word would spread. 2RP 14.

As part of their operation, Darby said, he had to seek to be allowed to make audio recordings "of various individuals that might be interacting in a criminal manner." 2RP 15-16. Darby described the requirements as getting a "Judicial Wire Order," saying it was the "same as any other type of warrant," that probable cause had to be established to link a person to a crime and there has to be "no other means of gaining or recording these conversations or overhearing these conversations." 2RP 15.

Darby had started doing mostly "narcotics" requests but recognized that, with the task force, "because they're not narcotics-related conversations" there were therefore different requirements. 2RP 16.

According to Darby, Harrie Chan and his half brother, Samnang Reuy, had sold both stolen cars and stolen property to officers in the Shiny Penny storefront. 2RP 16-17. Someone in the task force sought a judicial wire to record "interactions with Harrie Chan." 2RP 17. The Order was signed on January 16th and was good for seven days. 2RP 20.

Officers expected Chan to show up on January 22. 2RP 20. They had prepared an "operation" in anticipation of his arrival, which was scheduled for a specific fine. 2RP 21. Chan was coming down to "bring a vehicle." 2RP 21-22. The shop was run on an "appointment basis," using

texts and cell phone communications to schedule a time for people to come in so that the officers would have time to get surveillance and other coverage set up. 2RP 21-22.

While they were waiting for Chan, however, the officers inside Shiny Penny were told by "external surveillance units" that Nicholas Woody was walking towards the shop. 2RP 22-23. Darby was familiar with Woody from a "previous transaction." 2RP 22-23. Darby said a woman named Brianna Hudson had brought Woody into the shop and sold them a "stolen Jeep Liberty." 2RP 23.

On January 22, Woody came up and knocked on the door. 2RP 26. Woody apologized for arriving without warning but said he had lost contact with Hudson and so had not known how to contact them directly without dropping by. 2RP 25-26. According to the officer, Woody then described being in possession of numerous cars "that he had stolen from a car lot" and wanted to sell. 2RP 26.

The "wire" was not on during this initial communication. 2RP 27-28. Officer Darby said that, before Woody left, the officers agreed to have him bring the cars by to show them. 2RP 27.

Woody told the officers he would return in about 30 minutes. 2RP 27-28.

After Woody left one of the officers got a cellular telephone call from Harrie Chan, who said he was on his way down to the shop. 2RP 28. In anticipation of that arrival, the officer wearing the wire activated the recorder. 2RP 28. Instead, however, Woody returned, this time with someone else, Ryan O'Brien. 2RP 29. Woody was driving a Kia and

O'Brien was driving a Ford Explorer. 2RP 29. The officers then talked with them on tape about stealing and selling the cars. 2RP 29.

The officer admitted that Chan did not show up while O'Brien and Woody were there, although he opined they might have "actually been literally driving away" as Chan drove up. 2RP 30. The officers engaged in activity with Chan, which was also recorded. 2RP 30-31.

After that was complete, Officer Darby testified, they decided that the recordings of Woody and O'Brien should be sealed, describing them as "inadvertently recorded while we were attempting to record conversations with Harrie Chan." 2RP 33. The officers thus did not listen to the recordings, instead downloading them onto a CD and sealing the CD into an evidence bag, where it remained. 2RP 33.

During their conversation, the officers had set up another meeting with Woody for the next day, arranging to buy a certain car from him. 2RP 33-34. The officers used the circumstances and conversations on the 22nd to support a request for a wire for the next day. 2RP 35. They also used the same information and affidavit in subsequent requests for wires. 2RP 37.

Indeed, the officers used the exact same "cut-and-pasted affidavit" later, which became important at the hearing when it was discovered that the affidavit used on to get the wire on the 23rd was missing some pages. 2RP 37.

Darby did not know where the "access point" was for the original wire on the officer who was wearing it that day. 2RP 45-46. Darby also did not know how hard or easy it would have been to turn it on or off.

2RP 45-46. He admitted that, based upon what was learned in the unexpected recording of Woody and O'Brien on the 22nd, the officer submitted the case for filing of charges, including statements and information about what occurred during the conversation which was recorded that day. 2RP 46.

Prior to January 22, Darby admitted, the officers may not have even identified Woody as a suspect and they did not know of O'Brien at all. 2RP 47.

When asked about the second meeting on the 22nd, the officer admitted that, when Woody had come in alone, it was not planned, but when he came back with O'Brien, "that was a planned meet." 2RP 47. Darby also admitted that the officers knew that Woody and O'Brien could be arriving, too, when they turned on the wire in the hopes of catching Chan. 2RP 47.

Darby admitted that, at the time the officers made the recording of Woody and O'Brien, they knew that, unless a person who was a "subject" of the wire authorization was present, "that would be a recording outside the order." 2RP 50.

When the prosecutor asked it Darby had been present the previous day of trial when the prosecutor had a conversation with the detective wearing the wire and had heard that officer say that did not have time to take the wire off or turn it off, the court sustained the objection to "hearsay" despite the prosecutor's arguments it was proper. 2RP 51-52. The prosecutor then asked to be sworn as a witness and declared that he had talked with the officer wearing the wire and he said he had no time

to take it off, that it was under his clothing and could have "exposed the whole thing," so he left it on. 2RP 54. The prosecutor also noted that the exhibit had been marked by his office not to be used for discovery "or for any other purpose." 2RP 54. As a result, he said, the prosecutors and police took precautions to make sure no one listened to the tape. 2RP 54.

When the court turned to argument, the prosecutor was not prepared, saying he thought the hearing was only on the "evidentiary portion so we could frame the issues." 2RP 58. He declared, however, that counsel were wrong in identifying the issue, because there is no violation of the Act when the recording "was never used, never listened to, has no bearing on anything, it's not relevant[.]" 2RP 58. The prosecutor declared it was just "common sense" and thought that he had seen a case saying a "good faith" exception applied, but asked for additional time to look at the issue. 2RP 58-59.

The following week, when the parties returned to trial, the Privacy Act issue was again raised. 3RP 3. The prosecutor, who had chosen not to file a brief or provide any written argument to the court or parties, said that, instead, he had "communicated with [the court's] judicial assistant and defense regarding the State's position." 3RP 3. Apparently, that position was that there was no violation of the Privacy Act because the recording was not specifically used. 3RP 4. But the prosecutor also argued that there was no violation because the wire for Chan covered the conversation. 3RP 6-7.

The court did not agree and even after the prosecutor said the court was not "understanding" the evidence, the court was firm that, "when Mr.

Woody and O'Brien were there, Harry Chan wasn't there. When Woody was there, Harry Chan wasn't." 3RP 6-7. Indeed, the prosecutor also called it "much ado about nothing" that Chan was not present during the recording, which he thought encompassed the time "as Chan is arriving or just prior to his arrival." 3RP 8.

The court again disagreed, however, saying, "[i]f Chan is not there, then the 'others present' language wouldn't appear to apply." 3RP 8-9. The prosecutor then moved on to its "good faith" argument. 3RP 9-10.

During that discussion, when the judge returned to the violation of the statute, the prosecutor again noted that the court was not agreeing with him and the court and the prosecutor were "just going back and forth" on the issue. 3RP 12.

In ruling, the judge first said the officers did not "do anything, quote, wrong here," and said he did not think "they were trying to set up Woody and O'Brien even though they knew they were coming." 3RP 17. The court believed instead the officers were planning to "get Chan and weren't sure exactly when he would arrive, but they did violate the statute, and there is not a good-faith exception that I can see." 3RP 18.

The prosecutor then asked for a break to speak with his office about an "interlocutory" appeal. 3RP 20. When they returned, the prosecutor said that he would not be seeking interlocutory appeal because "the ruling terminates the state's case." 3RP 20. The prosecutor said that, regarding O'Brien, he could think of "no factual scenario" under which the state could continue to prosecute. 3RP 21-22. The court then ordered dismissal "without prejudice." 3RP 22.

D. ARGUMENT

THE TRIAL COURT PROPERLY HELD THAT THE OFFICERS VIOLATED THE PRIVACY ACT AND THE PROSECUTION'S CLAIMS TO THE CONTRARY DO NOT WITHSTAND REVIEW

Our state has one of the most protective "Privacy Act" laws in the country. See State v. Christensen, 153 Wn.2d 186, 198-99, 102 P.3d 789 (2004); see State v. Faford, 128 Wn.2d 476, 910 P.2d 447 (1996). In this case, the trial correct correctly followed the mandatory provisions of RCW 9.73.050 in suppressing the evidence, which was seized in violation of the Privacy Act. The state's claims to the contrary do not withstand review, because they are belied by even cursory review of the record and law.

Pursuant to RAP 10.1(g), O'Brien adopts and incorporates all of the arguments on this point made in the Response filed by Michael Elmore, his codefendant below and co-respondent on appeal. In addition, he submits the following:

On appeal, the prosecution has abandoned its "good faith" argument, presented below. Instead, it claims that the recording was somehow not a violation of the Privacy Act because it was authorized by the order granting leave to record conversations between officers and several named people, including Chan, and those "inadvertently present." See Brief of Appellant ("BOA") at 1-3. O'Brien and Woody were "inadvertently present" for the authorization for Chan, the prosecution suggests, even though Chan not only did not arrive during the conversation with O'Brien and Woody but did not arrive until after O'Brien and Woody had *left*.

In addition to the grounds set forth in Respondent Elmore's brief, the Court should also reject the prosecution's claims for several other reasons. At the outset, the prosecution includes lengthy discussion about the standards used on appeal when the issue is review of the sufficiency of the authorization to support a wire in the first place. See BOA at 12-13.

This case, however, is not about whether the officers properly secured the wire authorization for recording Chan in the first place. Instead, it is about whether the trial court properly refused to expand the exceptions to our state's strong Privacy Act by interpreting an authorization far beyond its reach. Put from the perspective of the state, that translates as, "[w]hether the trial court erred" in suppressing the evidence "when the recording was authorized by a valid order" authorizing recording of those "inadvertently present" during a conversation and the defendant made himself "inadvertently present?" BOA at 1-2.

Thus, the length an authorization must last, the "required contents" for the supporting affidavit, the review the issuing judge gives the request, the review this Court gives in a challenge to the sufficiency of an affidavit are all irrelevant and the prosecution's discussion of those principles, while interesting, are all of no moment. See BOA at 12-13.

In addition, the prosecution fails to mention nearly all of relevant portions of the record. BOA at 9-17. The prosecution's claim on appeal is that "O'Brien made himself inadvertently present" and thus recording him was covered under the portion of the order authorizing recording of "communication and conversations between Detective Darby, [Detective] Ducommun, Lofland, and Samnang Reuy and Harrie Oh Chan; and those

inadvertently present[.]" BOA at 13, quoting, Exhibit 4; 14-16 (same argument). The prosecution cites to portions of the record it says shows that O'Brien was "inadvertently present," effectively asking this Court to make factual findings on that point. BOA at 13-16.

But the prosecution fails to note - let alone discuss - the portions of the record where the issue of whether the definition of when someone was "inadvertenly present" was raised below. See BOA at 1-16; RAP 10.3. And it is unclear if the prosecution actually raised the same issue it now raises in this Court.

Initially, the prosecutor's position below was that there was no violation of the Act because the recording "was never used, never listened to, has no bearing on anything, it's not relevant[.]" 2RP 58. He also argued for a "good faith" exception. 2RP 58, 125.

After a weekend, however, and after presenting the testimony of Darby, however, the prosecution was saying there was no violation of the Privacy Act, because "[t]here was a judicial wire authorized for the time period in question." 3RP 6-7. The following exchange then occurred:

THE COURT:	It was to record Harry Chan.
MR. GREER:	And others present.
THE COURT:	Well, when Mr. Woody and O'Brien were there, Harry Chan wasn't there. When Woody was there, Harry Chan wasn't.

3RP 6-7. At that point, the prosecutor told the court it was not understanding the evidence. 3RP 7. The prosecutor declared his view that the officers had prepared for Chan to arrive but Woody then returned, unexpected, with O'Brien, so that O'Brien was "inadvertently recorded."

3RP 7.

The trial court, however, disagreed with the use of the term, "inadvertent," noting, "[t]he officers knew the recording was on." 3RP 7. 3RP 8. The court again returned to the belief that Chan's absence meant Woody and O'Brien were not "inadvertently present" as part of a conversation between Chan and officers. The prosecutor then told the trial judge that his concerns were "much ado about nothing." 3RP 8. The prosecutor argued that the language of the authorization allowed recording of "others present," which included people in the operation and suggested that it encompassed the time "as Chan is arriving or just prior to his arrival." 3RP 8.

But the trial court disagreed, declaring, "[i]f Chan is not there, then the 'others present' language wouldn't appear to apply." 3RP 8-9.

At that point, the prosecutor said that was "not the State's point" and that instead the argument the prosecution was making was "it was sealed, it was never used, it's as if it never happened." 3RP 8. The prosecutor then focused his argument on "good faith," stating that, under the "unique" facts of the case, because the officers did not "do anything to affirmatively violate anyone's rights. 3RP 9-11.

The judge said that whether

> accidental or not, the officers violated the statute here. It says you can't record somebody without their consent or judicial intercept order. They didn't have a judicial intercept order or consent for Woody or O'Brien, did they?

3RP 12.

Again, the prosecutor said he and the court were "just going back

and forth." 3RP 12. The prosecutor also repeated his belief that "the Chan and others present" language was "meant to encompass" the interaction before Chan arrived, because no one could not when and who would show up. 3RP 12. The judge intimated that the prosecutor's theory would allow someone to turn on a wire and just leave it on but the prosecutor said he thought the issue had to be looked at on a case-by-case basis. 3RP 13-14. The court did not revisit the issue, nor did the prosecutor. 3RP 1-28.

On appeal, the prosecution has not included any of this part of the record in its recitation of facts to the Court. See BOA at 1-17. But the prosecution is asking this Court to hold that the men were "inadvertently present" - the very ruling of the trial court the prosecution does not mention here. See id. The court's crucial discussion below of the issue of whether someone is "inadvertently present" is certainly relevant, given that it contains an oral ruling by the trial court finding that the two men were not "present" for the purposes of being "inadvertently present" during the conversations between Chan and the officers. See, State v. Hinds, 85 Wn. App. 474, 936 P.3d 1135 (1997) (effect of oral findings).

Notably, it appears that the prosecution drafted the "orders" granting the motion to suppress, which do not include a specific finding on the "inadvertently present" claim. 3RP 23.

Finally, the prosecution's arguments fly in the face of all of the interpretations of the Act thus far. Our highest Court has repeatedly interpreted the provisions of the Privacy Act broadly when determining the limits of protection under the Act but strictly when determining any exceptions, in recognition of purposes of the act. For example, in

interpreting relatively rare "all-party consent" requirement, the Court noted that it properly honored "individual privacy, even "at the expense of law enforcement's ability to gather evidence without a warrant." Christensen, 153 Wn.2d at 198-99. But in Faford, the Court reversed a trial court's narrow definition of when conduct was prohibited under the Act, "in light of the breadth of the [A]ct's purpose[.]" 128 Wn.2d at 483-84. In so doing, the Faford Court rejected the prosecution's efforts to claim that new technology not anticipated by the Act should not be covered under its protections. 128 Wn.2d at 485-86. "The sustainability of our broad privacy act depends on its flexibility in the face of a constantly changing technological landscape," the Court held. Id.

The prosecution's arguments on appeal ask this Court to expand the reach of an authorization for intruding into the privacy of a citizen. But the prosecution has not provided the Court any discussion of the relevant portion of the record below, as required. See RAP 10.3(a)(4) and (5); see LithoColor, Inc. v. Pacific Employers Ins. Co., 98 Wn. App. 286, 991 P.2d 638 (1998). Further, the prosecution's arguments run foul of the purposes of and caselaw regarding the Privacy Act. This Court should affirm.

E. CONCLUSION

As appellant, the prosecution has failed to show that the trial court erred and should be overturned. For the reasons stated herein, this Court should affirm.

DATED this 30th day of July, 2014.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office, first class postage prepaid to 946 County City Building, 930 Tacoma Ave. S, Tacoma, Wa. 98402, and to Mr. Ryan O'Brien, PC Jail BKG 2014147037, 930 Tacoma Ave. S., Tacoma, WA. 98402.

DATED this 30th day of July, 2014.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

RUSSELL SELK LAW OFFICES

July 30, 2014 - 3:39 PM

Transmittal Letter

Document Uploaded: 455315-Respondent's Brief.pdf

Case Name: State v. O'Brien
Court of Appeals Case Number: 45531-5

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: K A Russell Selk - Email: karsdroit@aol.com

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us
sccattorney@yahoo.com